Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

MORA HOTEL CORPORATION N.V. and CHASCONA N.V.,

Petitioners,

v.

CIBC MELLON TRUST COMPANY, as Trustee of Chrysler Canada, Ltd.'s Benefits Plan and Others, and DAIMLER CHRYSLER CANADA, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

JAMIE M. BRICKELL
Counsel of Record
GIDEON CASHMAN
LISA M. BUCKLEY
BENJAMIN K. SEMEL
PRYOR CASHMAN SHERMAN & FLYNN LLP
410 Park Avenue
New York, NY 10022
(212) 421-4100

Attorneys for Petitioners

182169

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

107 P

QUESTIONS PRESENTED

1. The New York Court of Appeals affirmed recognition of $300 million in judgments issued by an English court against Petitioners as sanctions for Petitioners' failure to comply with English Mareva Orders. Petitioners argued that the English court lacked jurisdiction over them and that recognition of the judgments would violate Petitioners' due process rights under the Fourteenth Amendment. The New York Court of Appeals held that Petitioners' jurisdictional defense was "abrogated" because of a court appearance by Petitioners in England two years after the judgments were issued. The New York court cited the Uniform Foreign Money Judgment Recognition Act as authority for this "abrogation."

   Can the defense that a court lacked personal jurisdiction to issue a judgment be abrogated under state law by a post-judgment appearance?

2. The conclusion by the New York Court of Appeals that Petitioners' due process rights were abrogated by a post-judgment appearance allowed that court to avoid discussing the extreme "conspiracy jurisdiction" on which the appeal centered. In order to enforce English judgments in the United States, Respondents must show that the English assertion of jurisdiction comported with American due process standards. However, all parties agree that the English court asserted jurisdiction over Petitioners based upon a provision of English law that does not require "minimum contacts." Rather, England asserted jurisdiction over an alleged remote fraudulent conspiracy based solely on the fact that one alleged co-conspirator (out of fifty defendants) maintained a domicile in England years after the alleged conspiracy took place. There was no allegation that the conspiracy caused acts or harmful effects in England, nor was it alleged that Petitioners had any business

connections to England. In the absence of clear guidance by this United States Supreme Court (hereinafter the "Court"), the lower New York courts attempted to reconcile this exercise of jurisdiction with our due process standards by using the ambiguous concept of conspiracy jurisdiction. Although admittedly a due process concern, conspiracy jurisdiction is erratically applied by federal and state courts, with dramatically conflicting standards depending on the venue.

Does due process allow the exercise of personal jurisdiction over a non-resident defendant with no business contacts in England, under a co-conspiracy theory, where there are no acts or harmful effects in England and jurisdiction over that defendant was based solely on a residence of one alleged co-conspirator in England?

3. The course of conduct followed by Petitioners in defending against Respondents' claims could not have resulted in a waiver of jurisdictional defenses if these claims had been brought in a federal or state court. However, the decision of the New York Court of Appeals concluded that such a waiver had occurred, citing its authority to recognize foreign judgments. The decision thus accords Petitioners less due process protection against a foreign judgment that is *coram non judice* than would be accorded against a like state or federal judgment.

Can the due process standards for exercising personal jurisdiction be applied differently as between domestic judgments and foreign judgments for which enforcement in sought in state courts?

PARTIES TO THE PROCEEDING

Petitioners

Petitioners are corporations whose sole business is owning and operating the Gorham Hotel in New York City. Petitioners' business operations are exclusively in New York. All of Petitioners' offices, employees and assets, including any bank and investment accounts, are located in New York. Petitioners conduct no business in England, own no property in England, have no bank accounts in England, maintain no offices or telephone numbers in England, and no employee of Petitioners has ever even visited England for business purposes. Petitioners have no parent corporations and no publicly held company owns 10% or more of the stock of either of the Petitioners. Petitioners were the defendants before the state motion court, and were appellants before the state appellate courts.

Respondents

Respondents are both Canadian corporations located in Canada. Respondent CIBC Mellon Trust Company is based in Toronto and appears in its capacity as trustee for various Canadian funds related to Respondent DaimlerChrysler Canada Inc., which is based in Windsor, Ontario. Respondents were plaintiffs before the state motion court, and respondents before the state appellate courts.

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Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the Court of Appeals of the State of New York in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York, dated May 8, 2003, is published at 100 N.Y.2d 215 (N.Y. May 8, 2003) and reprinted in Appendix A. The decision and order of the Supreme Court, Appellate Division, First Department, dated May 28, 2002, is published at 296 A.D.2d 81 (N.Y. A.D. 1st Dept. May 28, 2002) and reprinted in Appendix B. The unpublished judgment and order of the Supreme Court, County of New York, dated January 5, 2001 is reprinted in Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on May 8, 2003. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following Constitutional and statutory provisions:

A. The Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part, that: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . ."

B. Section 5305 of the New York Civil Practice Law and Rules, a provision of Article 53, for the Recognition of Foreign Country Money Judgments, which provides, in pertinent part, that:

"(a) Bases of jurisdiction: The foreign country judgment shall not be refused recognition for lack of personal jurisdiction if:

. . .

2. the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him."

STATEMENT OF THE CASE

Respondents brought suit in New York to recognize over $300 million in default judgments against Petitioners that were issued by an English court ("the English Judgments"). Petitioners argued to the New York courts that they had no minimum contacts with England, and that the English Judgments were therefore void for lack of jurisdiction.

This petition involves the power of a state court to reject Fourteenth Amendment arguments that a judgment is void for lack of personal jurisdiction. On May 8, 2003, the New York Court of Appeals affirmed summary judgment for Respondents, recognizing the English Judgments (the "State Decision"). In doing so, the court refused to consider Petitioners' argument that they had no minimum contacts with England. The court found that this argument was "abrogated" by an appearance in England occurring years after the English judgments had been issued. The New York court thus fashioned a new basis for personal jurisdiction - the "retroactive appearance" - the only retroactive basis for jurisdiction recognized by American courts. This new form of jurisdiction is wholly in conflict with the Constitution and centuries of precedent. Moreover, the State Decision is of unusually strong influence, as it was issued under the purported authority of the Uniform Foreign Money Judgment Recognition Act (the "Uniform Act"), which has been enacted by thirty-two states and the District of Columbia.

The second issue in this petition involves the reach of state long-arm jurisdiction in the context of recognizing foreign money judgments. Due process requires that, in

order for American courts to recognize a foreign judgment, it must have been issued by a court with jurisdiction over the defendant that comports with our Constitutional standards. *See, e.g., Griffin v. Griffin*, 327 U.S. 220, 229 (1946), *reh'g denied*, 328 U.S. 876 (1946) (Stone, J.) ("[d]ue process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process"). Thus, the New York courts could not properly recognize the English Judgments unless the assertion of jurisdiction by the English courts comported with our "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). This means that England must have the same "minimum contacts" with Petitioners that a state is required to have to exercise jurisdiction under the Fourteenth Amendment. *Id.* Since English courts do not have the same due process restraints as the United States, but rather assert jurisdiction in situations that would not be permitted by our Constitution, this is a vital inquiry.

Indeed, the English Judgments were issued pursuant to an English jurisdictional provision that does not require any minimum contacts. Appendix B at 35a n.5. Pursuant to English statute, English courts may assert jurisdiction over alleged co-conspirators to fraud where one alleged conspirator simply resided in England at the time the writ was issued. There is no requirement that the alleged conspiracy have any connection to England, nor that any other defendant have contacts with England. Such was the case here, as Petitioners have no contacts with England, and no evidence was offered in England or on the motion for summary judgment in the United States to show that the alleged conspiracy involved acts or harmful effects in England. In fact, the English court affirmatively declared that no acts related to the conspiracy took place in England.

Recognizing the English Judgments, the New York courts ignored the law holding that, in such a situation,

minimum contacts do not exist and jurisdiction is lacking. Rather, the lower New York courts pushed forward a sprawling doctrine of co-conspirator long-arm jurisdiction that goes well beyond the reach allowed by the Constitution. As noted above, the Court of Appeals refused to review Petitioners' jurisdictional arguments, finding that Petitioners' post-judgment appearance in England retroactively validated the English Judgments entered years earlier in proceedings that had closed. In addition to contradicting long-standing Constitutional principles and precedent, the Court of Appeals' decision impermissibly applies different rules to foreign country judgments than it would to domestic judgments, though the relevant Constitutional inquiry concerning personal jurisdiction is the same.

Petitioners ask the Court to review these due process questions as they arise in the increasingly important context of foreign judgments. The growing international nature of business makes it easier for plaintiffs who seek judgments against American residents to shop for favorable forums internationally. If American courts do not enforce due process guarantees on all judgments prior to enforcement, foreign forums with lesser guarantees of due process will become broad avenues for circumventing our Constitutional protections, making our residents, and the property owned in this country, subject to the laws of foreign nations.

The Facts Leading To The English Judgments

Respondents in this case are Canadian corporations that claim substantial losses from investment in Castor Holdings, Inc. ("Castor"), also a Canadian company. Appendix A at 2a. Castor's unexpected bankruptcy in 1992, a few months after its auditors valued the company at $1.8 billion, rocked the Canadian financial community. The Castor collapse spawned wide-spread litigation in Canada, and an extensive investigation by the Royal Canadian Mounted Police ("RCMP"), the Canadian national police service. The eight-year RCMP investigation

resulted in a 41-count criminal indictment against Wolfgang Stolzenberg, Castor's President, CEO and Chairman. Appendix B at 15a n.1. Petitioners were never considered suspects in the Castor fraud by the RCMP.

Nonetheless, in 1996, Respondents filed suit against more than thirty defendants (later increased to over fifty defendants, including Petitioners), alleging a fraudulent conspiracy. Respondents did not bring this suit in Canada, where the critical events occurred and where the evidence resided. The suit was filed in England, a jurisdiction having no connection to the parties or the dispute.

Under English law, anyone in the world who is deemed, in the judge's sole discretion, to be a "necessary or proper" party to a pending action, can be sued. Rules of the Supreme Court of England, Order 11, Rule 1(1)(c). There is no requirement of minimum contacts with England. All that England requires is that one defendant be a domiciliary of England at the time the writ is issued, after which jurisdiction may be had against anyone else anywhere. In this case, Stolzenberg's alleged domicile in London was the "anchor" and no other jurisdictional showing was made for the other defendants. Appendix A at 3a. The fact that the English court exercised jurisdiction without requiring any contacts between England and the Petitioners or the alleged conspiracy was noted by the New York appeals court. Appendix B at 35a n.5.

England was also a desirable forum for Respondents because it provides a confiscatory form of provisional relief known as the "Mareva" order. The Mareva order, which freezes assets worldwide and compels invasive financial discovery before issue is joined, has been aptly and disapprovingly described by this Court as "the nuclear weapon of the law." *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 329 (1999). Respondents had obtained a Mareva order against Petitioners even before serving the statement of claim.

Respondents' original statement of claim alleged a fraudulent conspiracy, but did not allege that Petitioners were part of the conspiracy. It alleged only a "tracing" claim against Petitioner Mora Hotel Corporation ("Mora"), seeking to recover approximately $600,000 in funds allegedly tainted by fraud. Petitioner Chascona was not even named in the suit at that time. Appendix A at 3a. Marco Gambazzi, a Swiss lawyer, was the alleged link between Mora and Castor. *Id.* at 2a. He was both a director and part owner of Petitioners, as well as an outside director of Castor. *Id.* Respondents contended that, by virtue of his role as an outside director, Gambazzi "must have known" about Stolzenberg's fraud.

Petitioner Mora made a special appearance in these proceedings for the limited purpose of contesting jurisdiction. *Id.* at 3a. Given that English law allows such a broad exercise of jurisdiction, however, the appeal was necessarily limited to the issue of Stolzenberg's residence in London at the time of the service of the writ, and was ultimately unsuccessful in the House of Lords. *Id.* at 3a-4a. During the course of these appeals, Petitioner Mora refused to comply with Mareva orders. *Id.* at 4a.

As a sanction for not complying with the Mareva orders, the English court "debarred" Mora from defending Respondents' claims, and issued judgment against Mora for the full amount of the $600,000 claim. *Id.* at 4a; Appendix B at 19a. Knowing that Petitioners would be debarred for failure to comply with Mareva orders, Respondents asserted a new claim that both Petitioners were co-conspirators, amending their statement of claim to seek $300 million against Petitioners. Appendix A at 4a.

The amendment was ostensibly based on imputing to Petitioners the supposed acts of Gambazzi (to whom the acts of Stolzenberg were imputed). It is notable that, at Respondents' instigation, the Public Prosecutor for the Canton of Ticino, Switzerland, conducted a comprehensive three-year investigation into Gambazzi, and

issued a forty-page ruling (Ruling No. 2062/2000/MR/AN (July 7, 2000)) concluding that there were "no grounds for maintaining an accusation [of fraud]" against Gambazzi. Nonetheless, the amendment was allowed, new bar orders were entered and Respondents obtained default judgments against Petitioners for the full $300 million. Appendix A at 5a. These sanctions were issued at a time when the jurisdictional appeal was still pending and an answer to the amended statement of claim was not yet due.

Since all of Petitioners' assets are in New York, Respondents immediately came to New York (while Petitioners' jurisdictional appeals were still pending in England) and sought recognition and enforcement of the English Judgments.

The New York State Court Proceedings

Shortly after filing their complaint, before any discovery took place, Respondents moved for summary judgment granting recognition of the English Judgments. Three New York courts reviewed Respondents' motion for summary judgment – the motion court, the intermediary Appellate Division and the Court of Appeals – and all three offered entirely different, and conflicting, rationales for recognizing the judgments. The motion court held that the English courts' denial of Petitioners' jurisdictional appeals (which were made under English law and limited to questions of Stolzenberg's domicile) was *res judicata*, a holding that was overturned on appeal. Appendix B at 28a-32a. Upon entering summary judgment, the motion court directed the receiver it had previously appointed to sell Petitioners' sole asset, the Gorham Hotel, refusing to issue a stay pending appeal.

Petitioners appealed, and on December 5, 2001, pending decision on appeal, Petitioners commenced a new proceeding in England, applying for leave to vacate the $300 million default judgments and contest the underlying cause of action on the merits (the "Post-Judgment

Application"). These acts took place well after the litigation in England had concluded, and while Petitioners were facing the loss of their sole asset in the imminent sale of the Hotel.

When the Appellate Division decided the appeal, it rejected the lower court finding of *res judicata*, since the English Judgments of course do not address the same question in this case – namely, whether jurisdiction existed under American Constitutional standards. Appendix B at 28a-32a.

The Appellate Division also clarified the Constitutional nature of this inquiry, citing twice to *International Shoe*. *Id.* at 26a, 28a. However, it also ruled that minimum contacts with England could be founded upon co-conspirator allegations, despite the fact that it was never proven that the alleged conspiracy involved acts or harmful effects in England, except for a single alleged co-conspirator's apartment in London at the time the writ was issued.[1] Appendix B at 41a-42a.

After accepting an appeal as of right based on the presence of a Constitutional question, the Court of Appeals offered the most radical holding of the three. The court held that, because of the Post-Judgment application, Petitioners' Fourteenth Amendment arguments would be deemed "abrogated," citing to the New York enactment of the Uniform Act. Appendix A at 9a.

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1. Respondents sought to manufacture connections between the alleged conspiracy and England for the purpose of the New York proceedings, making conclusory claims of such contacts without citation to facts. Respondents submitted no new affidavits based on personal knowledge in these proceedings, relying exclusively on documents submitted in England. Unsurprisingly, these documents neither show nor even allege a conspiracy connection with England. Indeed, the English court went so far as to hold that Respondents could not utilize a jurisdictional provision based on harmful acts occurring in England, implicitly holding that there was no evidence of any such acts. *See Canada Trust Co. v. Stolzenberg*, Case No. 1996 4995 (Ch D May 23, 1997) (Rattee, J.) (Eng.).

Petitioners' due process arguments were supposedly abrogated by Section 5305(a) of the New York Civil Practice Law and Rules, which states that a foreign country money judgment "shall not be refused recognition for lack of personal jurisdiction if . . . (2) the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him."

The Court of Appeals applied the statute in a patently unconstitutional manner, construing the phrase "in the proceedings" to include the Post-Judgment Application that was made in 2001, years after the proceedings leading to the English Judgments were closed in 1999. As the English court stated in its Post-Judgment Application decision, "it is to be noted that the [original] Proceedings [on which the default judgment was based] have already come to a conclusion." *Stolzenberg*, 2003 WL 117093 at ¶¶4, 112.

Centuries of precedent from this Court, and countless other courts, hold that a judgment that is void for lack of jurisdiction is *coram non judice*, and may not be retroactively resuscitated. Nonetheless, the New York Court of Appeals interpreted the state statute to "abrogate" Petitioners' Constitutional rights on just such grounds, affirming the grant of summary judgment against Petitioners and recognizing the English Judgments.

Given the powerful influence of the New York decision, which interprets the Uniform Act and is thus statutorily prescribed as persuasive precedent in over thirty states, Petitioners ask the Court to clarify that jurisdiction cannot be retroactively inserted into a void judgment. Also, the Court has yet to rule on the Constitutionality of conspiracy jurisdiction, a concept that has spawned extreme theories that are applied erratically by federal and state courts throughout the country. Petitioners ask that the Court clarify the Constitutionality of the concept and its application to this case.

REASONS FOR GRANTING THE PETITION

I. Petitioners' Defense To Recognition That The English Court Lacked Jurisdiction May Not Be Constitutionally Abrogated Under Color Of State Law By Petitioners' Post-Judgment Application In England

A. If The English Court Lacked Jurisdiction, The English Judgments Are *Coram Non Judice* And May Not Be Retroactively Validated

The New York Court of Appeals used Petitioners' Post-Judgment Application in December 2001 to retroactively insert jurisdiction into judgments that were rendered without jurisdiction in 1999. In doing so, it violated the centuries-old Constitutional principle that a judgment rendered without jurisdiction is void – not merely voidable – and cannot be retroactively validated. As the Court discussed in *Burnham v. Superior Court of California*, 495 U.S. 604, 608-09 (1990):

> The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books, see *Bowser v. Collins*, Y.B.Mich. 22 Edw. IV, f. 30, pl. 11, 145 Eng.Rep. 97 (Ex. Ch. 1482), and was made settled law by Lord Coke in *Case of the Marshalsea*, 10 Coke Rep. 68b, 77a, 77 Eng.Rep. 1027, 1041 (K.B. 1612). Traditionally that proposition was embodied in the phrase coram non judice, "before a person not a judge"—meaning, in effect, that the proceeding in question was not a judicial proceeding because lawful judicial authority was not present, and could therefore not yield a judgment. American courts invalidated, or denied recognition to, judgments that violated this common-law principle long before the Fourteenth Amendment was adopted. *See, e.g., Grumon v. Raymond*, 1 Conn. 40 (1814); *Picquet v. Swan*, 19 F. Cas. 609 (No.

> 11,134) (CC Mass. 1828); *Dunn v. Dunn*, 4 Paige 425 (N.Y. Ch. 1834); *Evans v. Instine*, 7 Ohio 273 (1835); *Steel v. Smith*, 7 Watts & Serg. 447 (Pa.1844); *Boswell's Lessee v. Otis*, 9 How. 336, 350, 13 L. Ed. 164 (1850). In *Pennoyer v. Neff*, 95 U.S. 714, 732, 24 L. Ed. 565 (1878), we announced that the judgment of a court lacking personal jurisdiction violated the Due Process Clause of the Fourteenth Amendment as well.

The principle was explained further in *Pennoyer v. Neff*, 95 U.S. 714, 732-33, 24 L. Ed. 565 (1878), which held that

> [s]ince the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.

Pennoyer explained that the jurisdiction of a court:

> cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. . . . The judgment, if void when rendered, will always remain void: it cannot occupy the doubtful position of being valid if property be found, and void if there be none. . . . This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law: the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently. (*Id.* at 728)

Pennoyer has been applied by the highest courts of at least two states to hold that a judgment rendered without personal jurisdiction cannot be retroactively validated by

a post-judgment appearance. *See Keen v. Keen*, 60 A.2d 200, 205 (Md. 1948); *Wiles v. Wiles*, 315 P.2d 131, 134 (Or. 1957).

The principle of *coram non judice*, as discussed in *Burnham* and *Pennoyer*, was also explained in the precise context raised in this petition – namely, a post-judgment motion to vacate that was held to supply the jurisdictional predicate for the judgment sought to be vacated – by the Supreme Court of North Carolina in *Monroe v. Niven*, 20 S.E.2d 311, 313 (N.C. 1942):

> When a court of general jurisdiction undertakes to grant a judgment in an action where it has not acquired jurisdiction of the parties by voluntary appearance or the service of process, the judgment is absolutely void and has no effect. It may, therefore, be disregarded and treated as a nullity everywhere. It is *coram non judice*. . . . A general appearance to move to vacate a void judgment does not validate a judgment rendered without service of process. "A nullity is a nullity, and out of nothing nothing comes. *Ex nihilo nihil fit* is one maxim that admits of no exceptions."

The Oregon Supreme Court analyzed this issue in *Wiles*, 315 P.2d at 134, explaining that:

> But when one moves to vacate a decree void on its face as a futile attempt at a judgment *in personam*, even if the motion be by a general appearance, it will not infuse a void judgment with the vitality which it lacks. 'The judgment, if void when rendered, will always remain void; * * * the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently.' *Pennoyer v. Neff*, (24 L. Ed. 570-571). The validity of a judgment is determined as of the date of its rendition and, if void, it

> remains so forever. Nor is a judgment ratified by moving to set it aside, or thus made better or worse. [citations omitted] . . .
>
> It is this very absence of vitality in a void judgment from the moment of its rendition that tends to explain why defendant's appearance in the matter, be it called general, cannot operate retroactively to give it life. A void judgment has been variously and picturesquely described many ways as wanting in any value or substance which can be revived. It has been termed: 'mere waste paper' [and] 'the mere image of a judgment.' [citations omitted] . . . .
>
> It is not only a denial of due process to enforce a judgment rendered without jurisdiction (*Pennoyer v. Neff*, 24 L. Ed. 572) but the mere act of fixing a sum due when the court is without jurisdiction is likewise an abortive exercise of judicial power repugnant to the Fourteenth Amendment. *Riverside & Dan River Cotton Mills, Inc. v. Menefee*, 237 U.S. 189, 35 S. Ct. 579, 59 L. Ed. 910 [1915]; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959, 963 [1874].

Petitioners' argument, asserted throughout the New York proceedings, is that the English Judgments were rendered by a court without personal jurisdiction – in other words, they are *coram non judice* under the Court's holdings in *Burnham* and *Pennoyer* and the protections of the Fourteenth Amendment. As the law makes clear, a post-judgment appearance is ineffectual to reincarnate such a null judgment. The decision of the New York Court of Appeals to the contrary affirms recognition of a void foreign judgment against Petitioners, in violation of their Fourteenth Amendment rights.

In addition to the cases cited above, the precedent on this question goes back centuries and continues to the present time.

In *Roberts v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 51 N.W. 478, 479 (Minn. 1892), *aff'd*, 164 U.S. 703 (1896), the court rejected the argument that "by the motion to vacate the defendant submitted to the jurisdiction of the court, and so made valid the judgment, even though it was rendered without jurisdiction." *See Bischoff v. Wethered*, 76 U.S. 812, 814 (1870) (refusing to enforce English judgment and holding "it is enough to say that [the English proceeding] was wholly without jurisdiction of the person, and whatever validity it may have in England . . . it can have no validity here, even of a *prima facie* character. It is simply null").

In *First National Bank v. Cunningham*, 48 F. 510 (C.C.D. Ky. 1891), the United States Court of Appeals cited to and quoted from *Godfrey v. Valentine*, 40 N.W. 163, 164-65 (Minn. 1888), which held that:

> The course of the moving party in thus seeking to have a void judgment set aside . . . but at the same time consenting and asking that the court shall now hear and adjudicate upon the cause, may justify the court in entertaining the cause and proceeding as in an action pending in which the defendant has voluntarily appeared. But in thus urging his legal right, and thus invoking and consenting to the future action of the court, the moving party should not be deemed to have conferred jurisdiction retrospectively, so as to render valid the previous judgment, which, being unsupported by any authorized judicial proceedings, was not merely voidable, but void, and in legal effect a nullity.

This long-established law was reiterated more recently by state high courts in *Marriage of Verdung*, 535 N.E.2d 818, 820 (Ill. 1989) ("a party who submits to the court's jurisdiction does so only prospectively and the appearance does not retroactively validate orders entered prior to that date") and *Weaver Construction Co. v. District Court In and For El Paso County, 4th Judicial Dist.*, 545 P.2d 1042,

1046 (Colo. 1976) ("general appearance subjected [defendant] [o]nly to the jurisdiction of the court from the date of the appearance, and is not retroactive as to validate the void judgment").

The highest court of Washington held in *Woodham v. Anderson*, 73 P. 536, 538 (Wash. 1903) that:

> [Defendants' general appearance] brought them within the jurisdiction of the court for all future proceedings in the cause .... But what had theretofore been done was done without jurisdiction. The judgment previously entered was void. Their general appearance at that time did not validate the void judgment, but simply brought them into court, without the necessity of new process, to be dealt with thereafter as the law of the case required.

See also Lore v. Citizens Bank of Winslow, 75 P.2d 371, 372 (Ariz. 1938) ("Appearance after such a judgment is entered against a party, whether general or special, will not cure a want of jurisdiction as to the judgment previously obtained"); *Moore v. Watkins*, 1 Ark. 268 (1839); *Gray v. Hawes*, 8 Cal. 562 (1857); *Davis v. Schimmel*, 482 S.W.2d 785, 790 (Ark. 1972) ("appearance does not cure any decrees previously entered in the case which are void for want of notice or process"); *Doyle v. Wilcockson*, 169 N.W. 241, 244 (Iowa 1918) ("a judgment which is void for want of notice can no more be validated after entry of judgment by any waiver of notice than it could be by serving a proper notice after judgment"); *Briggs v. Sneghan*, 45 Ind. 14 (1873); *Shaw v. Rowland*, 4 P. 146 (Kan. 1884); *Ivaldy v. Ivaldy*, 59 N.W.2d 373, 374 (Neb. 1953) (citing and quoting from numerous applicable and controlling authorities and concluding that a "general appearance does not relate back so as to validate the void proceedings. Its only effect is to confer jurisdiction over the person of defendant from its date"); *Gassett v. Snappy Car Rental*, 906 P.2d 258, 262 (Nev. 1995); *Eaton v. Cooke*, 393 P.2d 329 (N.M. 1964); *Harrington v. Rice*, 97 S.E.2d 239 (N.C. 1957); *Lathrem v. Foreman*, 151 N.E.2d 905, 908 (Ohio 1958)

("[d]efendant's subsequent appearance . . . in attempting to have the judgment vacated did not operate retroactively to place him before the court when the original judgment was rendered"); *State v. Cohen*, 13 S.C. 198 (1880); *Gallagher v. National Nonpartisan League*, 205 N.W. 674, 675 (N.D. 1925)

> [n]or do we believe that this void judgment became vested with life and validity because the defendants, when they sought relief against the judgment, made a general appearance . . . the general appearance of the defendants thus made did not operate retrospectively, so as to render valid the previous judgment, which in legal effect was a mere nullity . . . ;

Martin v. Cobb, 14 S.W. 162, 163 (Tex. 1890) ("The judgment was void when rendered. The filing of a motion to set it aside or the overruling of the motion, could not make it better or worse"); *Bennett v. Supreme Tent of Knights of MacCabees*, 82 P. 744, 746 (Wash. 1905). *Accord Telesco v. Telesco*, 447 A.2d 752, 755 (Conn. 1982) ("[a] void judgment is not subject to judicial reincarnation by the filing of written pleadings post judgment"); *Kohler Co. v. Department of Indus., Labor and Human Relations*, 259 N.W.2d 695, 701 (Wis. 1977) "[when court acts] in excess of its jurisdiction, its orders or judgments are void . . . A void judgment cannot be validated by consent, ratification, waiver, or estoppel"); *2-H Ranch Co. v. Simmons*, 658 P.2d 68, 72-73 (Wyo. 1983) (void judgment is "nullity," "entitled to no force or effect," and "subsequent acts taken on a nonexistent judgment must be void").

That Petitioners fall under this line of precedent is underscored by the facts. When Petitioners appeared in England and moved to vacate the English Judgments, the English court pointedly stated that "it is to be noted that the [original] Proceedings [on which the default judgment was based] have already come to a conclusion." *Stolzenberg*, 2003 WL 117093, ¶¶4, 112. Indeed, the proceedings on Petitioners' motion to vacate in 2002 and 2003 even bore different case numbers from the original 1996 proceedings on which the default was based. *See Id.; CIBC Mellon Trust Company v.*

Mora Hotel Corp. NV, Case No. CHANF/A3/2002/1106, 2002 WL 31476476 (CA Nov. 28, 2002) (Eng.).

As the precedent cited above indicates, the idea that an appearance in different proceedings years after a judgment was issued can be used as a means to validate and enforce the prior judgment entered *coram non judice* is repugnant to our Constitution.

B. The Authorities Cited By The New York Court Of Appeals Are Misplaced

The New York Court of Appeals ignored the wealth of cases cited by Petitioners indicating that a post-judgment appearance cannot retroactively validate a judgment that is void for lack of jurisdiction. Instead, the court asserted that the state enactment of the Uniform Act, and two Restatements, make no distinction between pre- and post-judgment appearances. Appendix A at 13a. The court's reliance on these authorities is misplaced. As noted above, the provisions of the Uniform Act may conform with due process protections if the clause "in the proceedings" is given its natural interpretation to mean "in the proceedings that lead to the judgment," rather than to mean "in any proceedings at any time," as held by the New York court.

Nor do the Restatements support the State Decision. Section 421 of the *Restatement (Third) of Foreign Relations Law* – the very section cited in the State Decision – recites that the reasonableness of jurisdictional is determined by looking at circumstances "at the time jurisdiction is asserted." *Id.* at § 421(2) (1987); Appendix A at 13a. The other cited provision, *Restatement (Second) of Conflict of Laws* § 33 cmt. b (1977), states that a post-judgment appearance may subject one to the jurisdiction of the court, but does not indicate that jurisdiction can retroactively validate the prior judgment. On the contrary, the same comment states that "[a] judgment rendered on the basis of a so-called appearance which does not satisfy the Constitutional requirements, as laid down by the Supreme Court of the United States, is void in the State of rendition itself." Thus, this comment as a whole is in

harmony with the precedent cited herein. When a post-judgment appearance is made, the court may obtain - from that time forward - jurisdiction, but judgments before such appearance are void and *coram non judice*, not susceptible to judicial reincarnation. *Id.*

The New York Court of Appeals also relied on the holdings of two federal district court cases, which it stated "involved post-judgment appearances," citing *Nippon Emo-Trans Co. v. Emo-Trans, Inc.*, 744 F. Supp. 1215 (E.D.N.Y. 1990) and *S.C. Chimexim S.A. v. Velco Enterprises Ltd.*, 36 F. Supp. 2d 206 (S.D.N.Y. 1999). Appendix A at 10a-11a. The Court of Appeals misinterprets the holdings of both of these cases, as neither supports its concept of a retroactive appearance.

In *S.C. Chimexim*, plaintiff sought to recognize a Romanian judgment against a Connecticut company for breach of contract. The Connecticut company had defaulted at the trial level, but had appeared and argued the merits of the case at the appellate level. 36 F. Supp. 2d at 210. Thus, while the appearance might be termed "post-judgment," referring to the trial court, it was "pre-judgment" with regard to the appellate court, which ruled for plaintiff on the merits after defendant had argued the merits to that court.[2]

These facts are in striking contrast to this case, where Petitioners did not argue on the merits to the English courts at any level. Rather, after exhausting the English appeals process on the jurisdictional issue, and after those proceedings had concluded, Petitioners sought leave to vacate the prior judgment and have new proceedings on the merits in the future. These proceedings never took place because leave was not granted.

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2. There was also no doubt that the Romanian court properly had jurisdiction over the defendant in accordance with American due process standards at the time the judgment was rendered. 36 F. Supp. 2d at 215-16. The defendant maintained a corporate office in Romania, conducted regular business there and the dispute arose from business conducted by defendant through the Romanian office. *Id.* In contrast, here, Petitioners have no contacts with England on which to predicate jurisdiction.

The other federal case cited by the New York Court of Appeals in support of its doctrine of retroactive appearance is *Nippon*. However, *Nippon* did not involve any such holding. In *Nippon*, plaintiff sought recognition of a Japanese judgment against a New York company. The defendant challenged jurisdiction before the Japanese courts and lost. The defendant then went to trial and lost. 744 F. Supp. at 1218. The judgment for which recognition was sought was the judgment issued after trial on the merits. *Id.*

The New York court ignored centuries of precedent from this Court and the high courts of dozens of states, establishing that a judgment issued without personal jurisdiction is void and may not be retroactively validated. Instead, the court cites to a sparse collection of authorities, none of which support its defiant practice of judicial reincarnation. The State Decision should be reversed as a violation of Petitioners' due process rights.

C. The Question Of Abrogating A Constitutional Right Is One Of Federal Constitutional Law To Be Determined By The Court, And May Not Be Decided Under Color Of State Law

Petitioners' primary argument throughout the New York proceedings was that the English court lacked jurisdiction, in violation of their Constitutional rights. This was openly acknowledged by the New York Appellate Division, which twice cited to *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945) in framing the legal issues of this case (Appendix B at 36a, 38a), and by the Court of Appeals as well. Appendix A at 5a. However, the New York Court of Appeals phrased its decision so as to attempt to avoid review by this Court, asserting that its decision was being rendered under the state enactment of the Uniform Act instead of the Constitution. *Id.* at 9a, 13a.

This holding by the New York Court of Appeals – that a state statute "abrogated" Petitioners' Fourteenth Amendment

right to question whether a judgment violated due process - conflicts with entrenched Constitutional law. *Id.* at 9a. This conflict is present whether the decision of the New York Court of Appeals is treated as an expansive application of long-arm jurisdiction or an expansive rule for waiving jurisdictional arguments.

New York is not free to assert jurisdiction in derogation of Constitutional protections.[3] *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984) ("the Due Process Clause of the Fourteenth Amendment operates to limit the power of a State to assert *in personam* jurisdiction over a nonresident defendant"); *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977). These Fourteenth Amendment protections apply equally whether a defendant is facing enforcement of a domestic or foreign judgment. *See Griffin*, 327 U.S. 220. *See also Boivin v. Talcott*, 102 F. Supp. 979, 981 (N.D. Ohio 1951) ("A judgment obtained in a Canadian court without jurisdiction as viewed under our laws assuredly can have no greater force or effect than if it had been obtained in our courts").

States have enacted a wide variety of long-arm statutes to empower their courts to exercise personal jurisdiction over non-resident defendants. Some long-arm statutes seek to extend the state's jurisdiction to Constitutional limits, while others stop short of the full reach of the Constitution. However, a state may not apply its long-arm statute to exercise jurisdiction that is broader than that which is permitted under federal due process principles as

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3. Nor can New York avoid review by this Court of their disposition of a constitutional claim by casting it in another light. *Williams v. North Carolina*, 325 U.S. 226, 236, *reh'g denied*, 325 U.S. 895 (1945) (states cannot "avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact") (citing *Norris v. Alabama*, 294 U.S. 587, 590 (1935)). The characterization by the New York Court that it was merely interpreting state law should not distract from the fundamental Constitutional questions at issue or the radical result of the State Decision.

explicated by the Court. *Helicopteros*, 466 U.S. at 413. *See also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (rejecting an assertion of jurisdiction by the Supreme Court of Oklahoma where minimum contacts did not exist "so as to permit Oklahoma courts to exercise jurisdiction consistently with due process under [its] long arm statute"); *Mario Valente Collezioni, Ltd. v. Confezioni Semeraro Paolo, S.R.L.*, 264 F.3d 32, 37 (2d Cir. 2001) (question of personal jurisdiction requires a "two-part analysis, looking first to the state's long-arm statute and then analyzing whether jurisdiction comports with federal due process").

The question of whether a Constitutional right has been waived is likewise not to be decided under state law. "The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards." *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Indeed, waiver of a Constitutional right is exclusively a question of federal law. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966). And under federal law, a waiver of a Constitutionally guaranteed right must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

It is a fundamental principle of judicial construction that courts indulge every reasonable presumption against waiver of Constitutional rights. *See Fuentes v. Shevin*, 407 U.S. 67, 95, *reh'g denied*, 409 U.S. 902 (1972) (In "civil no less than the criminal area, 'courts indulge every reasonable presumption against waiver'" of procedural due process rights) (citations omitted); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) ("Courts indulge every reasonable presumption against waiver of fundamental constitutional rights") (citation and quotations omitted).

Given the overwhelming law cited above which holds that a post-judgment appearance cannot retroactively validate jurisdiction, it cannot be held that Petitioners voluntarily and knowingly relinquished their due process

defense to jurisdiction by the Post-Judgment Application.[4] The fact that the original proceedings had already been concluded when the Post-Judgment Application was filed further emphasizes that no waiver was intended.

In short, there are no facts or law to indicate that Petitioners should have thought that they were relinquishing their due process right to attack the English Judgments as void for lack of jurisdiction when they made the Post-Judgment Application in England. In such a context, no waiver can be presumed. *See Johnson*, 304 U.S. at 464; *College Sav. Bank*, 527 U.S. at 682.

II. The English Assertion Of Jurisdiction Did Not Comport With Our Due Process Standards

"The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (quoting *International Shoe Co.*, 326 U.S. at 319).

The New York courts recognized $300 million judgments issued by a foreign country despite Petitioners' glaring lack of meaningful contacts with that country. The justification offered for recognizing this exercise of jurisdiction (other than abrogating the defense altogether) was a theory of conspiracy, or co-conspirator, jurisdiction. Appendix B at 38a-42a.

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4. Indeed, not even Respondents interpreted the Post-Judgment Application as a waiver. Petitioners brought their motion to vacate in 2001, while the appeal was still pending before the Appellate Division. Respondents made no submission to that court on this issue. In July 2002, after the Appellate Division affirmed summary judgment, the Court of Appeals directed the parties to submit argument on whether an appeal as of right should be granted due to the presence of a Constitutional question. Petitioners alleged that their due process defense of lack of jurisdiction was such Constitutional grounds, and Respondents did not argue waiver. It was not until February 2003 that Respondents first presented a waiver theory, offering the Court of Appeals an alternative to answering the thorny questions of conspiracy jurisdiction that were posed by the lower court decisions.

This theory, vague in concept and haphazardly applied, does not pass Constitutional muster.

A. Due Process Standards

There are two Constitutional inquiries to determine whether a court possesses personal jurisdiction: (1) does the non-resident defendant have minimum contacts with the forum; and (2) does maintenance of the suit against the non-resident defendant offend traditional notions of fair play and substantial justice. *See International Shoe Co.*, 326 U.S. at 316; *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987).

In expanding on the first inquiry, the Court stated that "minimum contacts must have a basis in 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Id.* at 109 (quoting *Burger King Corp.*, 471 U.S. at 475).

Minimum contacts generally fall into two categories. If the defendant has "continuous and systematic" contacts with the forum state, then general jurisdiction exists for any cause of action. *Helicopteros*, 466 U.S. at 414 n.9. General jurisdiction is not even alleged in this case.

Specific jurisdiction is the alternative test for minimum contacts, and it requires sufficient connections between the defendant, the forum and the cause of action. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984); *Shaffer*, 433 U.S. at 204; *Helicopteros*, 466 U.S. at 414 n.8; *World-Wide Volkswagen*, 444 U.S. at 295; *Calder v. Jones*, 465 U.S. 783 (1984); *Burger King*, 471 U.S. at 474.

In the second Constitutional inquiry, which is grounds for dismissal even if minimum contacts are found, the reasonableness of jurisdiction is judged by weighing the interests of the parties, forum, justice system and larger society. *See Asahi*, 480 U.S. at 113; *World-Wide Volkswagen*, 444 U.S. at 292.

B. "Conspiracy Jurisdiction" Based On The Domicile Of An Alleged Conspirator Does Not Satisfy Minimum Contacts

As the New York Appellate Division held, Respondents "rely upon the concept of co-conspirator jurisdiction to provide the basis for England's exercise of jurisdiction." Appendix B at 38a. The court went on to hold that "[a]pplication of this concept requires a showing that [Petitioners] were part of a conspiracy, at least part of which took place within the jurisdiction." *Id.* The only connection with England noted by the Appellate Division, or any other court, is that one alleged co-conspirator had a domicile in England. *See* Appendix A at 3a. This is sufficient contact for exercise of jurisdiction under English law. *Id.* However, such a broad exercise of conspiracy jurisdiction is patently unconstitutional under our Due Process Clause.

The Court held in *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) that "the parties' relationships with each other may be significant in evaluating their ties to the forum. The requirements of *International Shoe*, however, must be met as to each defendant over whom a state court exercises jurisdiction." *See also Calder*, 465 U.S. 783 (same).

At least two state high courts have interpreted the holding of *Rush* to preclude conspiracy jurisdiction altogether. *See National Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769 (Tex. 1995) and *Schwartz v. Frankenhoff*, 733 A.2d 74, 80 (Vt. 1999) (noting that the Court "has [] not decided whether participation in a conspiracy, without other contacts with a jurisdiction, is sufficient to meet due process requirements for personal jurisdiction. Its decisions strongly suggest, however, that conspiracy participation is not enough").

Courts have uniformly held that the exercise of jurisdiction over a party based solely on having jurisdiction over an alleged co-conspirator is not sufficient to show minimum contacts. *See Bamford v. Hobbs*, 569 F. Supp. 160, 169 (S.D. Tex. 1983) ("no court has conferred jurisdiction over an alleged conspirator merely because jurisdiction exists

as to a fellow alleged conspirator") (citing 4 Wright and Miller, *Federal Practice and Procedure* § 1069, at 52 (Supp. 1981)). This Court's decision in *Hanson v. Denckla*, 357 U.S. 235, 253, *reh'g denied*, 358 U.S. 858 (1958) appears to require, at a minimum, that relevant acts not only occur in the forum, but that such acts not be "unilateral activity" of an alleged conspirator. In other words, the non-resident defendant must have participated somehow in the acts. *Id.* ("The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State.")

The federal circuit courts and state high courts are in drastic conflict with each other as to the limits of conspiracy jurisdiction. The Ninth Circuit has flatly rejected the theory, stating in *Chirila v. Conforte*, 47 Fed. Appx. 838, 842-43 (9th Cir. 2002) that:

> There is a great deal of doubt surrounding the legitimacy of this conspiracy theory of personal jurisdiction. Although it has been accepted by some courts, *see, e.g., McLaughlin v. Copeland*, 435 F. Supp. 513, 529-533 (D. Md. 1977) (reviewing the history of and applying the theory), others have rejected it, *see, e.g., Gutierrez v. Givens*, 1 F. Supp. 2d 1077, 1083 n.1 (S.D. Cal. 1998) (rejecting the theory), *Kipperman v. McCone*, 422 F. Supp. 860, 873 n.14 (N.D. Cal. 1976) (same). The use of the theory has been criticized by commentators, *see, e.g.*, Ann Althouse, *"The Use of Conspiracy Theory to Establish In Personam Jurisdiction,"* 52 Fordham L. Rev. 234 (1983), and we have rejected an analogous theory, *see Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 492 (9th Cir.1979) (rejecting a conspiracy theory of venue).

Furthermore, this "analogous theory" noted by the Ninth Circuit in *Chirila*, namely using a conspiracy theory to establish venue, was soundly rejected by this Court in *Bankers Life and Casualty v. Holland*, 346 U.S. 379, 384 (1953), where

it was held to be a "frivolous albeit ingenious" argument. *Id.* The Court's holding in *Bankers Life* has been interpreted by courts to stand for the proposition that conspiracy allegations cannot form the basis for personal jurisdiction. *See, e.g., Coopers & Lybrand v. Cocklereece*, 276 S.E.2d 845, 850 (Ga. Ct. App. 1981). The flat rejection of conspiracy jurisdiction by the Ninth Circuit is also shared by certain state high courts. *See, e.g., National Indus. Sand Ass'n*, 897 S.W.2d 769; *Schwartz*, 733 A.2d 74.

Other federal and state courts recognize conspiracy jurisdiction, although none to the extreme that was exercised in this case. Moreover, those courts that do exercise conspiracy jurisdiction do so in countless conflicting ways. The Second Circuit has held that conspiracy jurisdiction may be exercised where one alleged conspirator commits an act within the forum state that is "for the benefit of, with the knowledge and consent of, and under some control by, the nonresident principal." *Grove Press, Inc., v. Angelton*, 649 F.2d 121, 122 (2d Cir. 1981). The Eleventh Circuit has instead cited to the application of a five-part test for conspiracy jurisdiction, involving: (1) the existence of conspiracy; (2) the defendant's membership in the conspiracy; (3) the occurrence of a substantial act or effect in furtherance of conspiracy in the forum state; (4) the defendant's actual or constructive knowledge of the act or effect in the forum state; and (5) the conspiracy conduct's direct or foreseeable cause of the act or effect. *Posner v. Essex Ins. Co.*, 178 F.3d 1209 (11th Cir. 1999). *See also Hercules Inc. v. Leu Trust & Banking Ltd.*, 611 A.2d 476, 482-85 (Del. 1992), *cert. dismissed*, 507 U.S. 1025 (1993).

The Seventh Circuit holds, by contrast, that conspiracy jurisdiction requires only "an actionable conspiracy and a substantial act in furtherance of the conspiracy performed in the forum state." *Textor v. Board of Regents*, 711 F.2d 1387, 1392-93 (7th Cir. 1983). The Federal Circuit, while refusing to adopt a clear holding, has made reference to a three-part test involving an "injury-causing act."

Edmond v. United States Postal Serv. Gen. Counsel, 949 F.2d 415, 425 (D.C. Cir. 1991)

> [w]e do not at this stage attempt to address the limits on the use of conspiracy theory to establish personal jurisdiction. Whatever those limits, it is an abuse of discretion to deny jurisdictional discovery where the plaintiff has specifically alleged: (1) the existence of a conspiracy, (2) the nonresident's participation, and (3) an injury-causing act of the conspiracy within the forum's boundaries.

Compare Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1031 (D.C. Cir. 1997) (making reference to absence of "personal jurisdiction under a conspiracy theory" and dismissing for failure to show minimum contacts). The Sixth Circuit has discussed the issue, but has not made a holding in any one direction. *See Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1237 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981) (after discussion of history of theory, ruled on other grounds, holding that "we need neither adopt nor reject the 'conspiracy theory' of *in personam* jurisdiction as a general principle of law in this circuit"). *See generally*, Stuart M. Riback, *"The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction,"* 84 Colum. L. Rev. 506 (1984); A. Althouse, *"The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis,"* 52 Ford. L. Rev. 234 (1983).

In *World-Wide Volkswagen*, the Court emphasized that past holdings assess the reasonableness of jurisdiction in the federal context not only because of the fairness concerns embodied in the Due Process Clause, but also because of the need for the "orderly administration of the laws." 444 U.S. at 293 (citing and quoting *International Shoe Co.*, 326 U.S. at 317, 319).

This imperative to administer Constitutional rights in an orderly fashion must be applied to the concept of conspiracy

jurisdiction. There is tremendous confusion and conflict regarding this concept. This case is a perfect example, as the New York courts recognized a foreign judgment by using the concept of conspiracy jurisdiction despite a complete lack of precedent in any remotely similar situation. The precedent cited herein indicates that conspiracy jurisdiction, at least in the broad manner that it was exercised by the New York courts in this case, does not pass Constitutional muster.[5] Petitioners respectfully request that the Court grant this petition and clarify the limits on this rapidly growing, yet still unpredictable, jurisdictional basis.

III. Due Process Standards For Exercising Personal Jurisdiction Cannot Be Applied Differently As Between Domestic Judgments And Foreign Judgments For Which Enforcement Is Sought In State Courts

In ruling that there had been a submission to the jurisdiction of England by the making of the application to set aside the $300 million default judgment and to contest the claims on the merits, the New York court perpetuated a concept of gamesmanship in the law pertaining to foreign judgments which New York, the Federal courts and other states have long abjured with respect to their own domestic judgments.

To put it directly: if a defendant in New York believes the court lacks personal jurisdiction, the defendant makes a

5. The exercise of jurisdiction over Petitioners also fails the due process inquiry into reasonableness, analyzed using the five-part test set forth by the Court in *Asahi*, which considers: (i) the burden on defendant; (ii) the interests of the forum State; (iii) plaintiff's interest in obtaining relief; (iv) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (v) the shared interest of the several States in furthering fundamental substantive social policies. 480 U.S. at 113. Where, as here, *none* of the parties, witnesses or evidence relating to Respondents' claims resides in England, and no acts or effects relating to the conspiracy occurred in England, the exercise of jurisdiction would be unconstitutionally unreasonable. *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 573-75 (2d Cir.), *cert denied*, 519 U.S. 1006 (1996); *Asahi*, 480 U.S. at 114; *Keeton*, 465 U.S. at 778; *Caruth v. International Psychoanalytical Ass'n*, 59 F.3d 126, 129 (9th Cir. 1995).

motion to dismiss. If the defendant loses the motion, the defendant may then contest the case on the merits and if the defendant loses on the merits, the defendant can appeal the propriety of the denial of the motion to dismiss and the substantive judgment. If appellate courts conclude that there had been no personal jurisdiction, the judgment against the defendant is dismissed.

No New York or Federal court would contend that by trying the case on the merits after moving to dismiss, the defendant had waived the Constitutional requirement of personal jurisdiction. Going forward with a trial on the merits, after denial of a motion to dismiss for lack of jurisdiction, would not be deemed a voluntary submission.

Contrast this treatment of a defendant by a New York court involving a domestic judgment with the treatment meted out to a defendant by a New York court in a situation involving the recognition and enforcement of a foreign country judgment. Here, the New York court, although well aware that Petitioners had carried their only available jurisdictional arguments to England's highest court, nevertheless held that any participation on the merits (having viewed the post-judgment application as tantamount to participation on the merits) constitutes a submission to the jurisdiction. This is diametrically opposite to what happens domestically. But there is no Constitutionally available reason why such an anomalous and invidious result should be the law in one instance and not in the other.

If participation on the merits after signifying a jurisdictional objection is not a submission to the jurisdiction in a domestic case, why should it constitute such submission in enforcing foreign judgments? Why should an American brought before a foreign court have to stake everything on its belief in the lack of personal jurisdiction by defaulting while his fellow American in a domestic challenge to jurisdiction is not required to default in order to preserve the jurisdictional point? Asking the question exposes the lack of due process afforded to an American defendant opposing recognition. An American sued in a foreign country, seeking

to avoid jurisdiction but having no vehicle for such an attack in that country, should be just as deserving of the solicitude of an American court in a recognition proceeding as its domestic counterpart who is able to make a motion to dismiss, thereby testing its belief in a lack of personal jurisdiction, and still defend the case on the merits without suffering the consequences of the foreign judgment defendant being deemed to have submitted to jurisdiction by going forward on the merits.

The New York court's position is an anachronism, a relation back to the sporting theory of justice. This discriminatory state action does not accord with established Constitutional principles. In *Cooper v. Aaron*, 358 U.S. 1, 19 (1958) this court states that, "[t]he Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodies and emphasized that ideal." The unequal, unfair and unjustifiable treatment accorded defendants by new York in the instant recognition proceedings, is the very antithesis of equal justice and violates the Due Process Clause.

The New York decision determines whether a waiver of Constitutional rights has occurred not based upon the acts and knowledge of the party alleged to have waived the right, but on the type of court - foreign or domestic - in which the judgment was rendered. This is in conflict with due process protections as well as principles of waiver. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937) ("[w]e do not presume acquiescence in the loss of fundamental rights."); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) ("in the civil no less than the criminal area, courts indulge 'every reasonable presumption against waiver'").

CONCLUSION

For all of the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMIE M. BRICKELL
Counsel of Record
GIDEON CASHMAN
LISA M. BUCKLEY
BENJAMIN K. SEMEL
PRYOR CASHMAN SHERMAN
& FLYNN LLP
410 Park Avenue
New York, NY 10022
(212) 421-4100

Attorneys for Petitioners